

STATE OF MICHIGAN
COURT OF APPEALS

BLUE CROSS AND BLUE SHIELD OF
MICHIGAN,

Plaintiff-Appellant,

v

GENESEE COUNTY ROAD COMMISSION,

Defendant-Appellee.

UNPUBLISHED
June 13, 2013

No. 305512
Genesee Circuit Court
LC No. 11-095641-CZ

GENESEE COUNTY ROAD COMMISSION,
CITY OF SAGINAW, CASS COUNTY and
TUSCOLA COUNTY,

Plaintiffs-Appellants,

v

BLUE CROSS AND BLUE SHIELD OF
MICHIGAN,

Defendant-Appellee.

No. 313023
Genesee Circuit Court
LC No. 09-091910-CL

Before: M. J. KELLY, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

In Docket No. 313023, plaintiffs, the Genesee County Road Commission (GCRC), the city of Saginaw (Saginaw), Cass County (Cass), and Tuscola County (Tuscola), appeal as of right from an order granting summary disposition in favor of defendant, Blue Cross and Blue Shield of Michigan (BCBSM). In Docket No. 305512, plaintiff, BCBSM, appeals as of right from an order granting summary disposition in favor of defendant, GCRC. We affirm the order in Docket No. 313023, and dismiss the appeal in Docket No. 305512 as moot.

The case in Docket No. 313023 is one of several that government entities across the state have filed against BCBSM based on BCBSM's practice of charging self-insured health care

customers an “access fee.” In *Calhoun Co v Blue Cross and Blue Shield of Mich*, 297 Mich App 1; 824 NW2d 202 (2012), this Court addressed the issue; that decision is dispositive in resolving the issues raised in these two appeals.¹ The factual summary provided in *Calhoun Co* provides a brief background of BCBSM’s access fee:

[BCBSM] is governed by various Michigan statutes and is legally obligated to subsidize insurance policies for any Medicare-eligible person who is not a member of a “group.” [BCBSM] internally refers to this subsidy as “other than group” (OTG). [BCBSM] is also required to maintain a contingency fund and ensure that each “line of business” is independently funded. [BCBSM’s] self-insurance plan is one “line of business.”

In the late 1980s, [BCBSM] separately billed its customers for the cost of the OTG subsidy. Many self-insured customers were dissatisfied with paying the OTG charge; as a result, some customers hired [BCBSM’s] competitors, while others simply refused to pay the OTG charge. [BCBSM] ultimately decided to merge mandatory business charges such as the OTG charge into the hospital claims for self-insured plans. Thus, the various business charges were no longer “visible” on billing statements, but were instead built into the bill submitted to the customer (after a reduction had already occurred because of [BCBSM’s] network discounts). According to [BCBSM], these built-in charges were part of an access fee that was structured in part as the cost for access to defendant’s hospital network discounts. [*Id.* at 4-5.]

I. DOCKET NO 313023

In Docket No. 313023, GCRC *et al.* contend that this Court’s decision in *Calhoun Co* does not govern their action against BCBSM, so the trial court erred in granting summary disposition to BCBSM on that ground. We disagree.

This Court reviews de novo a trial court’s decision on a motion for summary disposition. *Cedroni Assoc v Tomblinson, Harburn Assoc*, 492 Mich 40, 45; 821 NW2d 1 (2012). When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, and other evidence in the light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A summary disposition motion brought under MCR 2.116(C)(10) should be granted “if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Id.* “The existence and interpretation of a contract are questions of law reviewed de novo.” *Kloian v Domino’s Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

¹ Our Supreme Court subsequently denied Calhoun County’s leave to appeal our decision, stating that it was “not persuaded that the question presented should be reviewed by this Court.” See *Calhoun Co v Blue Cross and Blue Shield of Mich*, 493 Mich 917 (2012).

GCRC *et al.*'s argument that *Calhoun Co* does not apply because it was fact-dependent is unconvincing. Both this case and *Calhoun Co* involve contract disputes, and the pertinent language of the contracts at issue is identical. See *Calhoun Co*, 297 Mich App at 5-8. For example, each of the Administrative Services Contracts (ASCs) includes this provision in Article III:

The Provider Network Fee, contingency, and any cost transfer subsidies or surcharges ordered by the State Insurance Commissioner as authorized pursuant to 1980 P.A. 350 will be reflected in the hospital claims cost contained in Amounts Billed. [*Id.* at 6.]

In addition, the ASCs in this case and in *Calhoun Co* define "Amounts Billed" as "the amount the Group owes in accordance with BCBSM's standard operating procedures for payment of Enrollees' claims." See *id.* The sample Schedule As provided in this case contain the same language as Calhoun County's Schedule A's from 1995 to 2006: "[y]our hospital claims cost reflects certain charges for provider network access, contingency, and other subsidies as appropriate." See *id.* at 7. Presumably, the 2007 Schedule A cited in *Calhoun Co* matches the 2007 Schedule As that GCRC, Saginaw, Cass, and Tuscola, received and signed. See *id.*

Thus, this Court's interpretation of the contracts in *Calhoun Co* is directly applicable to the interpretation of the contracts in this case. This Court concluded that the ASC signed by Calhoun County and BCBSM was a valid contract, agreed to by both parties. *Calhoun Co*, 297 Mich App at 13-14. There was legal consideration, competent parties, and a proper subject matter. *Id.* at 14. The parties agreed to bound by the rights and obligations outlined in the ASC and Schedule As. *Id.*

This Court in *Calhoun Co* also addressed the issue of whether the contractual provisions providing for the access fee were unenforceable because of indefiniteness. See *Calhoun Co*, 297 Mich App at 14-19. The Court noted that Michigan law disfavors allowing a party to avoid contractual obligations based on indefiniteness. *Id.* at 14, citing *Nichols v Seaks*, 296 Mich 154, 159; 295 NW 596 (1941). Generally, a contract is enforceable if the promises and performances expected by both parties are set forth with reasonable certainty. *Calhoun Co*, 297 Mich App at 14. The absence of a price term does not automatically render a contract provision unenforceable. *Id.* at 14-15. The common-law rule provides:

In an appropriate case an agreement may be enforced as a contract even though incomplete or indefinite in the expression of some term, if it is established that the parties intended to be bound by the agreement, particularly where one or another of the parties has rendered part or full performance.^[2] [*Id.* at 15, quoting *JW Knapp Co v Sinas*, 19 Mich App 427, 430-431; 172 NW2d 867 (1969) (footnote

² We note that GCRC and Saginaw began contracting with BCBSM in 2006, Cass in 2001, and Tuscola in 1995. Since at least 1994, the ASCs and Schedule As contained similar or identical language with respect to the additional fees that GCRC *et al.* now contend is unenforceable for vagueness. See *Calhoun Co*, 297 Mich App at 7.

added); see also 1 Corbin on Contracts, §§ 95, 96, 99, 102; 5 Williston on Contracts, § 1459; 1 Williston on Contracts (3d ed), §§ 36, 36A, 40, 41, 49; Restatement, Contracts, § 5.]

This Court made several legal conclusions in *Calhoun Co.* It found that both parties intended to enter into a binding contract. *Id.* at 15. Both Calhoun County and BCBSM agreed to all terms of the ASC and Schedule A, including the access fee provision. *Calhoun Co.*, 297 Mich App at 15-17. Calhoun County's argument that it did not agree to any fees other than the administrative fee and stop-loss coverage fee belied the express language of the ASC in Article III. *Id.* Article III specifically cites to other fees (collectively referred to by the parties as the access fee) and states that they will be reflected in the hospital claims cost of the Amounts Billed. *Id.* Amounts Billed is defined broadly in the ASC as the amount owed in accordance with BCBSM's standard operating procedures. *Id.* at 16. Thus, the ASC expressly allowed BCBSM to collect the access fee, stated how it would be collected (in the hospital claims cost of the Amounts Billed), and indicated how the access fee would be determined – in accordance with BCBSM's standard operating procedures. *Id.*

This Court went on to conclude that the lack of a specific dollar amount in the ASC or Schedule As did not render the access fee provision unenforceable. *Calhoun Co.*, 297 Mich App at 17-18. Rather, the amount need only be “reasonably ascertainable.” *Id.* at 18. This Court held that the access fee amount was reasonably ascertainable through BCBSM's standard operating procedures. *Id.* This Court referenced the Development of Access Fee Factors document and said that this document was “in conformity with” BCBSM's standard operating procedures. *Id.* at 18-19. This method was objective and based on the fees and costs historically charged to each customer. *Id.* at 19.

GCRC *et al.* argue that BCBSM's standard operating procedures do not include the Development of Access Fee Factors document or any other method for determining the access fee. GCRC *et al.* do not dispute that BCBSM has a method for determining the access fee. In their reply brief, GCRC *et al.* state:

The question is not whether [BCBSM] had a method to determine the amount of the access fees. Of course it did – the amount was not a random number plucked from thin air. Rather, the issue is whether the term in the contract – “standard operating procedures” – used in conjunction with the “payment of Enrollees claims” means the method [BCBSM] uses to calculate the price of the access fee which it paid to itself.

The ASCs specifically state that the access fee is reflected in the hospital claims cost of Amounts Billed, and Amounts Billed is defined as “the amount owed in accordance with [BCBSM's] standard operating procedures.” Thus, GCRC, Saginaw, Cass, and Tuscola, have agreed that they will be charged an access fee that is calculated in accordance with BCBSM's standard operating procedures. We agree with BCBSM's contention that its standard operating procedures do not have to be in a compilation or manual. “Standard operating procedure” is defined as “a set of fixed instructions or steps for carrying out routine operations.” *Random House Webster's College Dictionary* (2010). The United States Supreme Court has described standard operating procedures as “the regular rather than the unusual practice.” *Int'l*

Brotherhood of Teamsters v United States, 431 US 324, 336; 97 S Ct 1843; 52 L Ed 2d 396 (1977). These ordinary meanings, in conjunction with the ASC language and this Court's decision in *Calhoun Co*, indicate that BCBSM needs to have a set of fixed steps, or a regular method, for determining the access fee. It is undisputed that BCBSM has such a method.

GCRC *et al.* also contend that, contrary to this Court's conclusion in *Calhoun Co*, 297 Mich App at 19, the method for calculating the access fee would not have been revealed through an audit. In *Calhoun Co*, this Court presumed that the Development of Access Fee Factors and formula results would have been produced in the audit. *Calhoun Co*, 297 Mich App at 19. In arguing that the contractual audit would not have revealed any information on how the access fee was calculated, GCRC *et al.* cite to the testimony of a health care industry expert in two other cases against BCBSM. Even if GCRC *et al.*'s assertions are true, it is the amount of the access fee itself that must be reasonably ascertainable, not BCBSM's method for calculating it. *Calhoun Co*, 297 Mich App at 18 ("because the *amount* was reasonably ascertainable through defendant's standard operating procedures, the contract does not fail for indefiniteness" (emphasis added)). GCRC *et al.* do not claim on appeal that the amount of access fees they paid was unavailable to them. There is no indication that prior to this lawsuit, GCRC, Saginaw, Cass, or Tuscola asked BCBSM for that information. BCBSM asserts that a customer could seek a report regarding how much its access fees were in a period. Thus, the amount of access fees was reasonably ascertainable.

We therefore conclude that, under *Calhoun Co*, the trial court properly granted BCBSM's motion for summary disposition in this docket. We affirm the trial court's grant of summary disposition. See MCR 7.215(J)(1).

II. DOCKET NO. 305512

In Docket No. 305512, BCBSM asserts that the trial court erred in granting GCRC's motion for summary disposition. BCBSM claims that if its contract with GCRC is unenforceable, then it is entitled to equitable relief. After this Court issued its decision in *Calhoun Co*, BCBSM filed a brief with this court noting that its appeal in Docket No. 305512 is moot if its motion for summary disposition is granted in Docket No. 313023. We agree. Because we conclude that the trial court properly granted BCBSM's motion for summary disposition in that case, BCBSM's request for relief in this docket is moot, and we decline to address it. See *City of Warren v City of Detroit*, 261 Mich App 165, 166 n 1; 680 NW2d 57 (2004).

We affirm the order in Docket No. 313023, and dismiss the appeal in Docket No. 305512 as moot.

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Mark T. Boonstra